

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 75 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? Yes
2. To be referred to the Reporter or not? Yes :
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
3 to 5 No

BHAVNAGAR TRANSPORT COMPANY

Versus

VALMIKBHAI HIMATLAL PATEL

Appearance:

MR MB GANDHI for Petitioner
MR SURESH M SHAH for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 05/07/1999

C.A.V. JUDGEMENT

1. In peculiar circumstances of the matter controversy surfaces whether a third party Obstructor and in possession of immovable property of which recovery of possession is sought by warrant in the execution proceedings by Decree-Holder can claim to have his right adjudicated upon by executing court on preferring an

Application alleged to have been filed under Order 21 Rule 97 of the Civil Procedure Code and all the more when Decree Holder chooses not to complain before executing Court about removing such obstruction and files no application to remove obstruction under Rule 97 of Order 21 of C.P.C.

2. The Suit being Regular Civil Suit No. 523 of 1972 was filed by one Patel Valmikbhai Himatlal and others against the defendant Patel Mohanbhai Muljibhai and others for the recovery of the possession of rented premises. The suit was decreed and it appears that the matter was pursued by the defendants till Supreme Court but they failed and thereafter original plaintiff Patel Valmikbhai and Other filed an Execution Application before the Civil Judge, J.D., at Bhavnagar, being Civil Regular Execution Application No. 38 of 1998 for recovering the possession of the suit premises.

3. In the above mentioned Execution proceedings, a third party i.e. the present appellant, Bhavnagar Transport Company, a registered Partnership firm, through its Partner Shri Jayantibhai Mathurdas Patel, filed an Application at Exhibit 6, stating that they are in possession of the immovable property, which is the subject matter of the Execution Application, and they are the Obstructor of obtaining the possession by the decree holder. It was also urged to remove the obstruction by the third party and to adjudicate upon the the rights of the third party to retain the possession and till then the recovery warrant for possession be stayed.

4. The Application was dismissed by the Executing Court vide Order dated 12th February, 1999. The present applicant filed a Civil Regular Appeal No. 34 of 1999 before the District Court, Bhavnagar, which also came to be summarily rejected vide order dated 21st April, 1999 and hence the present appellant first filed Civil Revision Application, and thereafter, the same was converted into the Second Appeal. The Executing Court rejected the above Application Exhibit 6 of the present appellant on the ground that the present appellant had no locus standi to file the application for the removal of the obstruction under R.97 O. 21 of CPC, nor such applicant can demand before executing court to adjudicate upon the rights of the parties under R.97(2) O.21 of C.P.C. While the First Appellate Court rejected the Appeal of present appellant because First Appellate Court came to the conclusion that the order passed by the Executing Court was not appealable and the order was subject to Revision by the High Court because appellate

court came to believe that the application of obstructor applicant was not falling squarely under R.97 of C.P.C. and hence the executing court did not pass order under R.97 of O.21 of C.P.C. and, therefore, the appeal filed by the present applicant was not considered competent.

6. Learned Advocate Mr. M.B. Gandhi on behalf of the appellant and learned Advocate Mr. S.M.Shah on behalf of the respondent were heard at length.

7. In the background of the above mentioned facts, two issues arise for the determination of this Appeal.

(i) Whether appellant being an Obstructor is entitled to declare before the court that he is the Obstructor and to move the court to adjudicate upon his right to retain the possession and to remove the obstruction, if any? Under R.97 and R. 97(2) of O.21 of C.P.C. especially when decree holder anyhow considers this not to be an obstruction in recovery of possession of the property because decree holder did not prefer any application for removal of obstruction under R.97 O.21 of C.P.C.

(ii) Whether appeal lies against an order of rejection by executing court of such application filed by the Obstructor before any Executing Court under Order 21 Rule 97 of the Civil Procedure Code?

8. Learned Advocate for the Appellant Mr. M.B. Gandhi has vehemently urged that now with the amendment in the Civil Procedure Code, once the obstruction is declared before the Court, Court is obliged under R.97(2) and thereafter under R.98 of O.21 of C.P.C. to remove the same and follow the procedure to investigate the title and interest of the obstructor as soon as the obstructor declares himself before the Executing Court to be an Obstructor. In his submission, Mr. Gandhi has relied upon the two decisions as under:

(a) Chandravati Co-op.Housing Society Ltd., Maninagar vs. Bhairavnath Education & Cultural Society Trust & Others, reported in 1993 (1) GLR 166.

(b) Bhanwarlal vs. Satyanarain, reported in (1995) 1 SCC 6.

While Mr. S.M. Shah has urged that it is not the right of the Obstructor to move the Executing Court under Order 21 Rule 97. Only when the decree holder moves the court

to remove the obstruction, the court is obliged to adjudicate the claims and investigate into the title of the property, of which the possession is to be recovered by the decree holder.

9. Now referring to the Point No.1 mentioned above, the construction of Rule 97 of Order 21 is required to be looked into. A bare reading of Rule 97 of Order 21 gives clear impression that the right to move the court is conferred upon the decree holder only and not to anyone except decree holder. Rule 97 is as under :

R.97. Resistance or obstruction to possession of immovable property.

- (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.
- (2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Therefore, it is clear that the words occurring in later part of the Sub-Rule (1) " he may make an application to the Court complaining of such resistance or obstruction" invariably refers to the words appearing in first part i.e. "where holder of decree immovable property" in Sub-Rule (1). Thus, construction of Rule 97 (1) makes it very clear that right to make an application to remove the obstruction is given only to the holder of decree or any purchaser of the property in execution of the decree. None else, except the persons referred under Rule 97 can make any application for the removal of the obstruction. The view canvassed by Mr. Gandhi that merely on a declaration of the obstruction, the Executing Court is obliged to investigate into the title of the property and to remove the obstruction, could not find favour of this court having regard to the simple construction of Rule 97 of Order 21. Some of the High Courts have taken this view and some decisions have also been referred by the Executing Court in its Order below Exhibit 6 in Execution Application No. 38 of 1998 vide para 5. The Application of the present appellant has no locus standi at all to claim a right to move the court for removing the obstruction having declared

himself to be an obstructor. It is a privileged locus standi given to the decree holder only. Had the intention of the Legislature to confer any third party with the right to move such an application, then, the express provision would have been made in R.97 of O.21 of C.P.C., but instead, the express provision is made giving exclusive right to a decree holder or the persons referred in Rule 97 of Order 21 to apply the court under Rule 97. Further, examining the scheme of the Civil Procedure Code, specially Order 21 Rules 35, 36, 95 97 and 98, makes it abundantly clear that Legislature never intended to confer upon a right to third party to move the Executing Court to move an application to remove the obstructions. This is so, because if third party claims title over such property, which is being recovered in pursuance of an execution of a decree, remedy is always provided to him to file a civil suit for the title, or if any such party is dispossessed, Rule 99 of Order 21 of the Civil Procedure Code confers a right upon such party to move the Executing Court to inquire into the title of the property. Examining this Scheme of the Code as observed above, any third party cannot claim any locus standi, who is not a decree holder or a purchaser from a decree holder to move the court to remove the obstruction and to have an enquiry into the title and status of such third party, vis-a-vis, property to be recovered in execution proceedings. The construction of Rule 97 of Order 21 is clear to the extent that even an Executing Court cannot act suo moto. Sub Rule (2) of Rule 97 O.21 makes it further clear that the court shall proceed to adjudicate upon the application when such application is filed under R. 97(1) O.21 and that application can be filed by decree holder only. Therefore, the procedure having regard to the scheme of the Code clearly appears to be permissive and not mandatory. It is a permission granted to the decree holder but it is not mandatory on the decree holder to file an application when an obstructor moves the court nor it is obligatory upon the court to investigate the title and to remove the obstruction on such declaration and hence the view canvassed by Mr.M.B. Gandhi on behalf of the appellant cannot be upheld.

9. Mr. Gandhi has relied upon the decision of this Court in the case of CHANDRAVATI CO-OP. HOUSING SOCIETY LTD vs. BHAIRAVNATH EDUCATION & CULTURAL SOCIETY, reported in 1993 (1) GLR 116 and has emphasised that the Court is obliged to investigate into the title of the Obstructor once such application is given by the Obstructor. In Para-7 of the above mentioned decision, this Court observed as under :

"In 10th Edition of AIR Commentaries on the Civil Procedure Code, the remedy of a holder of decree for possession is summarised in a tabular form as under :

Person obstructed	Obstructed	Remedy

1. Holder of decree for possession	(a) On obstruction by judgment-debtor or by person claiming under him.	(i) May proceed under Rule 97.
		(ii) May apply again in execution of the decree under Rules 95 and 36, and if obstructed again, may apply under Rule 97 (2).
	(b) On obstruction by third parties.	(i) May proceed under Rule 97.
		(ii) May apply again in execution of the decree under Rules 85 and 36.
		(iii) May institute a regular suit for possession.

From the aforesaid gist of the rights of holder of decree for possession it can be said that when holder for decree of possession was obstructed by third party, Rule 97 provides him a remedy to apply to the Court complaining of such resistance or obstruction and sub-rule (2) of Rule 97 which is substituted for old sub-rule (2) provides that the Court shall proceed to adjudicate upon the application in accordance with the provisions contained therein. The sub-rule (2) of Rule 97 is major departure from the scheme of removal of obstruction enacted under Old Rule 97. It is

pertinent to note that once such application is given by the holder of decree for possession, the executing court is obliged to proceed to adjudicate upon the application. The use of the words "shall" proceed to "adjudicate" leave no room for doubt that the exercise which the Court is to undertake is that of adjudicating the claims of the parties. The legislature has by introduction of the aforesaid sub-rule (2) of Rule 97 substituted the summary remedy provided to a decree-holder by a full fledged adjudication proceeding and the order made therein has the force of the decree and is subject to an appeal. The period of limitation to an application complaining of resistance or obstruction to delivery of possession of immovable property is 30 days from the date of resistance or obstruction under Art. 129 of the Limitation Act, 1963. It therefore becomes clear that remedy which is provided to a holder of decree for possession of immovable property under Rule 97 of Order 21 is not a substantive remedy wherein even adjudication of right, title and interest of the obstructor can be gone into by the executing Court in view of the language employed in Rule 101 of Order 21 of C.P. Code. It may be mentioned that over and above the remedy provided by Rule 97(2), it is open to him to file a regular suit for possession when obstruction is by third party."

10. It is very much clear from the above mentioned observation made by this Court that it is a right of the decree holder only to move the court for removing of the obstruction and when such application is made, then the Executing Court shall proceed with the application in accordance with the provisions therein contained and those provisions are under Rule 98, Rule 100 and Rule 101. The observations made by this Court leaves no room for doubt that on an application of the holder of decree only, the Court shall adjudicate upon the complaint made by the decree holder. This decision, on the contrary, goes against the view advanced by Mr. M.B. Gandhi.

11. In the above mentioned case, Obstructor declared before the executing court that he was the obstructor. Thereafter, Decree holder filed an application under R.97(1) of O.21 of C.P.C. and made complaint before executing court regarding obstruction. The obstructor thereupon filed his objections against the recovery of possession and hence the ratio of the above mentioned

decision is when an application is made by a decree holder or a purchaser from the decree holder, under Rule 97 of Order 21, to remove obstruction, it is obligatory upon the Court to proceed to adjudicate upon the application of decree holder. While in this case, though appellant - obstructor had filed the declaration that he is obstructor and obstruction is required to be removed, but the decree holder, however, did not consider this to be an obstruction and he did not file any application to remove obstruction. In absence of such application from decree holder, the executing court, would not have jurisdiction to act under sub.R.(2) of R.97 of O.21 of C.P.C. On request of third party, while an application for removal is filed by decree holder, the executing court would be obliged to act under Sub-R. (2) of R. 97 of O.21 of C.P.C.

13. Mr. M.B. Gandhi has also placed reliance on the decision of the Supreme Court in the case of BHANWARLAL vs. SATYANARAIN, reported in (1995) 1 SCC 6. Therein also, there was an obstruction to delivery of possession in pursuance of an execution of the decree, the decree holder had made application under Rule 35(3) instead of Rule 97. The Supreme Court observed that the application made must be treated as one of under Rule 97 and the application was not time barred. In the above mentioned decision, in Paras 3 and 5, the Supreme Court has observed that the decree holder gets a right under Rule 97 to make an application against a third party to have his obstruction removed and an enquiry thereon could be done. Hence, this decision also will not help the appellant.

14. From the above discussion, it becomes crystal that when the holder of a decree for possession or the purchaser of any such property sold in execution of the decree comes with a warrant for possession, the appropriate remedy of a person other than the judgment debtor is to resist or obstruct the order of a decree for possession. The third party has to obstruct and resist the process of execution with regard to the warrant for possession. The warrant for possession is obstructed and resisted, then decree holder or the purchaser, may complain before the executing court by filing an application. It may be remembered that Decree-holder in those circumstances may not file any application under R.97(1) O.21 of C.P.C. and may proceed further with the execution because the provision is apparently permissive one. But if such an application is filed by Decree-holder, executing court thereupon may issue notice

to the obstructor or third party. Third party then has right to file his objections and in these circumstances executing court is obliged to adjudicate upon the application under sub-R.(2) of R.97 of O. 21 of the C.P.C. The scheme of Order 21 nowhere by whisper even gives any right to any third party obstructor to approach the executing court directly and even if decree holder chooses not to file an application for removal of the obstruction, insist upon the executing court to adjudicate his (third party objector) objections regarding the warrant for possession. To give this meaning to R.97 of Order 21 of the C.P.C. would mean to add something in the provisions, which was never intended to be made by the legislature in their wisdom and, therefore, a third party obstructor cannot have any right to say that since he has filed an application to remove obstructions under R.97 O.21 and that executing court is obliged to adjudicate upon his application.

15. None of the above mentioned decision establishes that any third party or Obstructor has right to declare before the Court and file an application for the removal of the obstruction and thereafter the court is obliged to proceed to adjudicate upon such application.

16. The next point which is advanced whether the view taken by the First Appellate Court that the order rejecting the application of the Obstructor under Order 21 Rule 97 by the Executing Court is not an appealable order, is a correct view? Mr. Gandhi argued that any order made by the Executing Court is made appealable under R.103 of O.21 of the Civil Procedure Code and appeal lies and, therefore, the view of the First Appellate Court that appeal would not lie, is erroneous. Mr. M.B. Gandhi basing his argument on the Full Bench decision of this court in the matter of PRABHASHANKAR SHANKARLAL JOSHI vs. FULSINHJI KESHARSINHJI PARMAR, reported in 1984 (4) GLH 662 argued that in Rent Act matters, even otherwise appeal lies and the First Appellate Court took the wrong view. Sofar as the first part of the argument of Mr. Gandhi is concerned, the Lower Appellate Court was correct in coming into a finding that no appeal lies because an obstructor has no right to file an application under R.97 of O.21 of the C.P.C. Under R.103, those orders are made appealable which are passed by the executing court under Rule 98 of O.21 upon an application made by the decree holder under R.97 (1) of O.21 of the C.P.C. and to adjudicate upon by the court under R.97(2) of O.21 of the C.P.C. The orders which are not passed by the executing court in pursuance of an application of a decree holder preferred under Rule

97(1) of O.21 are not the decrees under R.103 of O.21 and, therefore, the First Appellate Court was correct in taking a view that the appeal was not maintainable. So far as the second part of the argument of Mr. M.B.Gandhi is concerned, though it has been held by the Full Bench of this court that the Code of Civil Procedure, 1908 mentioned in the Rent Act and the Rules made thereunder, would be that Code as it stood in 1953 when it came to be incorporated in the Rent Act and not as amended in 1976 and, therefore, appeal would lie against the determination of any question under Section 47 of the Code of Civil Procedure in execution proceedings under the Bombay Rent Act. Now, as per this observation of Full Bench decision, the old Code of 1908 is to be taken as referred under the Rent Act and the order passed in the execution proceedings were made appealable as per Section 47 of the Civil Procedure Code, 1908 because Section 47 was embodied in the definition of a decree in the Code of 1908. Even applying the ratio of this Full Bench decision to the present facts, the appellant will not have a right of appeal against the order of the executing court simply because this right is available to the parties to the suit only under Section 47 (old Code) of the Civil Procedure Code. Section 47 of the old Code makes those orders appealable which are arising between the parties to the suit in which the decree was passed, or their representatives. Section 47 C.P.C. 1908 does not contemplate the questions which arise between the third party and the parties to the suit. It is evident that the present appellant was not the party to a suit. He is a stranger to the litigation and, therefore, no question arises between the parties of the suit as mentioned in Section 47 C.P.C. 1908 and hence even if applying old Code which is required to be applied in the Rent Act matters, the present appellant would not get any right of appeal.

17. Now therefore, even if considering the Second Appeal to be a Revision and viewing this to be a revision, as discussed above, none of the courts below has fallen in the error of law nor any of the findings of the courts below is perverse so as to be interfered with even in a revisional jurisdiction.

18. During the course of the hearing, Mr. S.M. Shah on behalf of the respondent stated that after filing of the Second Appeal, no stay was granted in favour of the appellant to stay the execution of the decree by this Court and hence in pursuance of the execution of the decree, now, the possession of the premises, which is the subject matter of these proceedings, is already

recovered. Mr. Gandhi has admitted this fact. However, Mr. Gandhi insisted to decide the above mentioned law points.

19. In this view of the matter, the Second Appeal has no substance and the same is dismissed. Notice is discharged with no order as to costs.

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